IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 26, 2006

STATE OF TENNESSEE v. DWIGHT MORTON SPENCE

Direct Appeal from the Circuit Court for Marshall County
Nos. 16822 & 16825 Robert Crigler, Judge

No. M2006-00133-CCA-R3-CD - Filed November 22, 2006

The appellant, Dwight Morton Spence, pled guilty in the Marshall County Circuit Court to two counts of manufacturing a Schedule VI controlled substance and two counts of possession of drug paraphernalia and received an effective five-year sentence. On appeal, he claims that the trial court should have ordered him to serve his sentences on community corrections. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and J.C. MCLIN, JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the appellant, Dwight Morton Spence.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; William Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At the appellant's guilty plea hearing, the State presented the following factual account of the crimes: On August 26, 2004, police officers went to the appellant's home, searched it, and found eighty-eight marijuana plants growing in pots. They also found plants drying in the oven and paraphernalia used to grow marijuana. Officers did not arrest anyone at that time. On July 27, 2005, officers obtained an arrest warrant and returned to the residence. They found ten to nineteen more marijuana plants and additional drug paraphernalia used to grow marijuana. Officers arrested the appellant and his wife, and the appellant told the officers that he had been growing the marijuana plants for "a while." He also told the officers that he used marijuana frequently and that he did not

sell the marijuana but traded it with coworkers. The appellant pled guilty to Class C and Class D felony possession of marijuana and two counts of misdemeanor possession of drug paraphernalia.

At the appellant's sentencing hearing, Beth Ladner from the Tennessee Probation and Parole Department testified that she prepared the then forty-three-year-old appellant's presentence report. The appellant told her that he smoked marijuana because it helped relax his arthritis pain and that he had been growing marijuana for the past four years. He also told her that he and his wife smoked marijuana frequently and that the older he got, the more marijuana he smoked. The appellant's sixteen-year-old daughter from a previous marriage apparently lived with him and his wife while he was growing the marijuana plants. In 1999, the appellant was convicted of misdemeanor vandalism and received a six-month sentence, to be served on probation. In 1996, he was convicted of misdemeanor assault and received another alternative sentence. In 1992, the appellant was convicted of felony eluding law enforcement with a deadly weapon and felony possession of ten to seventy pounds of Schedule VI drugs. For those convictions, he was ordered to serve four years on probation, but his probation was revoked less than a year later.

Shane George, a Shelbyville police officer assigned to the Seventeenth Judicial District Drug Task Force, testified that in 2004, he and other officers went to the appellant's home, and the appellant invited them inside. The appellant informed the officers that he was growing marijuana in a bedroom, and the officers discovered a "fairly elaborate growing operation." Officer George stated that grow-lights were hovering over ten-gallon buckets containing soil and numerous marijuana plants and that heating and air circulation systems were in the bedroom. The officers also found marijuana plants growing outside. They counted a total of eighty-eight plants but did not arrest the appellant or his wife at that time. He stated that one plant would yield about one pound of usable marijuana. The appellant admitted to the officers that he grew and smoked the marijuana but denied selling it.

The State introduced the appellant's presentence report into evidence. In addition to Beth Ladner's testimony, the report shows that the appellant dropped out of high school after completing the eleventh grade but obtained his GED. In the report, the appellant stated that he began smoking marijuana when he was sixteen or seventeen years old and used cocaine one time. He stated that he had taken prescription drugs for arthritis in his back but could no longer afford them due to a lack of insurance. The appellant began growing marijuana because it relaxed his back pain, which enabled him to work, and because it was too expensive to buy on a daily basis. The appellant described his mental health as good and his physical health as fair, stating that he had high blood pressure and arthritis in his back and shoulders. According to the report, the appellant worked for Ken-Koat from September 1994 to December 2000, Radiation Protection Productions from February 2001 to August 2004, and for Holland Employment Services from September 2004 to April 2005.

The trial court applied enhancement factor (1), that the "defendant has a prior history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range," and (8), that the "defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community." Tenn. Code Ann. § 40-35-114(1), (8) (2005).

In mitigation, the trial court applied factor (1), that the "defendant's criminal conduct neither caused nor threatened serious bodily injury." The trial court imposed a five-year sentence for the Class C felony possession of marijuana conviction; a three-year sentence for the Class D felony possession of marijuana conviction; and two eleven-month, twenty-nine-day sentences for the possession of drug paraphernalia convictions. The trial court ordered that the sentences run concurrently but denied the appellant's request for alternative sentencing, stating,

> alternative sentencing has been tried and failed in two prior circuit court cases. And also he had the benefit of suspended sentences two other times.
>
> . . . .
>
> And Mr. Spence, it may be -- also I will take into account the fact he admitted in the presentence report that . . . while he didn't sell it, he did admit he distributed marijuana to people.

II. Analysis

On appeal, the appellant challenges the trial court's denial of alternative sentencing, claiming that he has "special needs" and "meets all the criteria" for a community corrections sentence. When an appellant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2005). However, this presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the record demonstrates that the trial court failed to consider the sentencing principles and the relevant facts and circumstances, review of the sentence will be purely de novo. Id.

In conducting our review, this court must consider (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to the sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2005). See also Ashby, 823 S.W.2d at 168. The burden of showing that a sentence was improper is on the appellant. Tenn. Code Ann. § 40-35-401 (2003), Sentencing Commission Comments.

Tennessee Code Annotated section 40-35-102(5) (2005) provides that only "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration." A defendant who does not fall within this class of offenders and who is "an especially mitigated or standard offender convicted of a Class C,

D or E felony, should be considered as a favorable candidate for alternative sentencing options." Tenn. Code Ann. § 40-35-102(6) (2005). Generally, a defendant "shall be eligible for probation . . . if the sentence actually imposed upon such defendant is ten (10) years or less." Tenn. Code Ann. § 40-35-303(a) (2005).

The Community Corrections Act of 1985 was enacted to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. Tennessee Code Annotated section 40-36-106(a)(1) provides that an offender who meets all of the following minimum criteria shall be considered eligible for community corrections:

> (A) Persons who, without this option, would be incarcerated in a correctional institution;
>
> (B) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
>
> (C) Persons who are convicted of nonviolent felony offenses;
>
> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (F) Persons who do not demonstrate a pattern of committing violent offenses . . . .

For offenders not eligible for community corrections under subsection (a), Tennessee Code Annotated section 40-36-106(c) creates a "special needs" category of eligibility. Subsection (c) provides that

> [f]elony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

Tenn. Code Ann. § 40-36-106(c).

Because the appellant entered pleas to Class C and D felonies and was sentenced as a Range I, standard offender to less than ten years, he was presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. §§ 40-35-102(6), -303(a). However, an offender is not automatically entitled to community corrections upon meeting the minimum requirements for eligibility. State v. Ball, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998). Moreover, the presumption of alternative sentencing may be rebutted by "evidence to the contrary." Tenn. Code Ann. § 40-35-102(6); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000). Guidance as to what constitutes "evidence to the contrary" is found in Tennessee Code Annotated section 40-35-103(1), which provides for confinement when:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and "evincing failure of past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

The record supports the trial court's denial of a community corrections sentence. The presentence report reflects that the appellant has several prior felony and misdemeanor convictions, including a felony conviction for drug possession. Moreover, the appellant has previously received alternative sentences and has had two of those sentences revoked. In the instant case, officers found marijuana in his home in August 2004. When they returned to his home in July 2005, almost one year later, they discovered that he still was growing marijuana. The appellant has never sought treatment for his addiction to the drug, and the trial court's comments reflect that it believed the appellant has a low potential for rehabilitation. Given the appellant's prior convictions, prior revocation of alternative sentences, extensive history of marijuana use, failure to seek treatment, and the facts of this case, we agree. Accordingly, the trial court properly denied the appellant's request for alternative sentencing.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE